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Perhaps no legal discipline is as maligned and misunderstood as International Environmental Law. The first words of Daniel Bodansky's excellent new book, *The Art and Craft of International Environmental Law*, are a quote by scholar J.L. Brierly, who noted that, "[t]oo many people assume . . . that international law is and always has been a sham."[1] In the same chapter, Professor Bodansky himself notes that the "Environmental" sub-discipline of international law, which is relatively new, is even more difficult to characterize as "law," as some understand the term.[2] But importantly, before the end of chapter one, Professor Bodansky does note that persons and states do act in ways that seem to give credence to international environmental law, and thus, "it matters."[3]

This first chapter alone provides a good self-contained explanation of how International Environmental Law is a discipline and why, and this itself is a very valuable reading assignment for persons interested in the area.[4] But the book goes so much further. In its 300 plus pages, it explicates the evolution of International Environmental Law, its various normative components, the major players, and most helpfully, how it actually works and can perhaps be made to work better. As a professor who teaches International Environmental Law and a scholar who has studied international attempts at climate change control, I can say this is the best single source book I have read in setting out and explaining how the whole thing works. Professor Bodansky notes his history of being a negotiator of international agreements, and the book does take an "insider's view" of how law is made and operates. But

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1. DANIEL BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW 1 (2010).
2. *Id.* at 14.
3. *Id.* at 15.
4. *Id.* at 4-15.

it does so with the scholar's inquisitive eye. Rather than merely describe what happens, Professor Bodansky attempts, and I believe succeeds, in explaining the hows and whys.

Among the best parts of the book are Professor Bodansky's explication of the difference between laws and policies and how even a normative idea may have elements of "law." He also explains how international law is more than just treaties and, in particular, what "custom" is and how it is generated. With respect to "custom" in International Law, he correctly notes that "custom" is not necessarily related to the actual custom of nations, but instead to their aspirations — what they "should" do.[5] He then describes how it can have real effect, by noting that:

These Principles operate as meta-rules, which establish the context within which bargaining takes place to develop more specific norms. . . Although they do not determine the result, they channel the negotiations by setting the terms of the debate, providing evaluative standards, and serving as a basis to criticize other states' proposals.[6]

Bodansky also does an excellent job of explaining that the players in the international environmental law arena are not just the states, but other parties and the constituent components of the state. He neither embraces nor rejects the theory that states "act in their own self-interest," but quite expertly shows how a state's "self-interest" is itself made up of the interests of domestic parties and institutions. While much of this is relevant and of interest to scholars of international law generally, Professor Bodansky does stake out an important distinction for international *environmental* law — that because it tries to solve worldwide problems, it may, more than most other international law, bring states to a cooperative stance as cooperative action allows all to benefit.

Given my admiration for the book, it seems a bit churlish to quibble with any of it, but there is one area that I thought deserved more examination and closer scrutiny, and that is the importance of rights and equity. But lest I bury Bodansky and fail to praise him, I also want to give hearty applause to his important and thorough discussion of the role of individuals and personal beliefs in forming international environmental law.

I. The Importance of Rights and Equity to the Debate

In Chapter 4, *Prescribing the Cure: Environmental Policy 101*, Professor Bodansky reviews what might be called environmental policy implementation devices or methods that can be brought to bear to address environmental problems set out in the previous chapter. This is clearly an important cog in the understanding of International Environmental Law because it explores what is possible — how can we address international environmental problems?

In answering that question, Professor Bodansky notes the importance of first defining the goals of the solution and then privileges two options which he calls the "absolutist approaches" and the "balancing approaches."[7] He characterizes the absolutist approaches in terms of cleaning the environment no matter what the cost, while characterizing the

5. *Id.* at 196-99.
6. *Id.* at 203.
7. *Id.* at 59-63.

balancing approaches by weighing costs and benefits of environmental controls.[8] While these are two broad ways of looking at norms of environmental protection, and while Professor Bodansky clearly understands that both positions are nuanced, I think this discussion deserves more explanation.

As Professor Bodansky rightly points out, answering the "goals" questions is probably the most important consideration of international environmental law,[9] and importantly, this question can be bound up with how one approaches facts about problems and solutions.[10] In other words, if goals themselves are not clear, nothing else from negotiation to implementation will be clear either.[11] In this instance, the so-called absolutist approaches should perhaps be broken down even more into what kinds of absolutist approaches exist. Professor Bodansky notes the possibilities of 1) "nature" having its own rights, and 2) a human right to the environment,[12] but these approaches are not created equally, certainly not in the realm of international environmental law. The issues of what persons or societies have entitlements to be free from environmental harm or a right to compensation is incredibly important, possibly a driving factor in many international environmental law problems.[13] Professor Bodansky refers to this fact often throughout the book in his discussion of the norm of avoiding trans-boundary environmental harm, the discussion of the importance of equity, and how the solution to anthropogenic climate change has and should proceed. Indeed in Chapter Four, Professor Bodansky identifies equity as a consideration in terms of implementation of goals.[14] While none of this is incorrect, I think the importance of human entitlement is more important to the story of International Environmental Law than Professor Bodansky provides.

As an illustration, we can look at the ongoing negotiations over climate change. As Professor Bodansky notes, before the Kyoto Protocol, much of the discussion of which country should do what was focused on equity.[15] The position of many of the developing countries was that any solution must grant each country a fair share of emissions, possibly an allotment of per capita emissions.[16] Those that did not use all of them could sell them or bargain with countries that needed more, but that this should be the beginning position.[17] The huge swing this would have made in the status quo entitlement made it seem almost impossible for some negotiators, yet it was one of the original staked positions.[18] This position in turn made

8. *Id.*
9. *Id.* at 58, 141-43.
10. *Id.* at 2-3.
11. *See* Victor B. Flatt, *Saving the Lost Sheep: Bringing Environmental Values Back into the Fold with a New EPA Decisionmaking Paradigm*, 74 WASH. L. REV. 1, 17 (1999).
12. BODANSKY, *supra* note 1, at 60-61.
13. Flynn Coleman, *Pan-African Strategies for Environmental Preservation: Why Women's Rights are the Missing Link*, 23 BERKELEY J. GENDER L. & JUST. 181, 183 (2008).
14. BODANSKY, *supra* note 1, at 69.
15. *Id.* at 144.
16. Paul G. Harris, *The European Union and Environmental Change: Sharing the Burdens of Global Warming*, 17 COLO. J. INT'L ENVTL. L. & POL'Y 309, 325 (2006); Rachel Ward Saltzman, *Distributing Emissions Rights in the Global Order: The Case for Equal Per Capita Allocation*, 13 YALE HUM. RTS. & DEV. L.J. 281, 285 (2010).
17. Harris, *supra* note 17, at 325.
18. *Id.*

possible the principle of shared but divergent responsibility for solutions — that the developed world should bear the burden of greenhouse gas control.[19] This view was partly justified by the wealth of the developed world; it was even more justified by the historic contributions to the problem and the resulting industrialization from which the developed world benefitted.[20] Ultimately, this explains why the countries of Eastern Europe, poorer than many of the other developing countries excluded from mandatory reductions, were joined with the countries with mandatory controls.[21]

Equity is also an important factor in the continued evolution of positions, culminating in the latest agreement in Durban for the 17th Conference of the Parties (COP17), which took place just scant weeks ago. At the time of the of COP15, the 15th conference, which was held in Copenhagen, the positions of countries, particularly that of the United States, shifted to the belief that major developing countries needed binding limits on their emissions.[22] While no one suggested that the limits should be equivalent to reductions for the developed countries, the importance of this issue drove these and subsequent negotiations. Why? To be sure, some of the developing countries were richer in 2009 than in 1993 and, from a practical standpoint, it was easy to argue that reductions only from the developed world would not address the problem, especially when China had moved into the position of being the world's largest emitter of greenhouse gases.[23] But perhaps this is a push towards equity, given that the major developing countries incrementally became such large producers of greenhouse gases.[24] In addition to China's status as the largest emitter, India is moving into the number three position.[25]

It is certainly not the case that these countries have failed to take steps to foster reductions. In fact, China's energy efficient campaign for automobiles and electricity production have led to the largest drop in emissions intensity ever recorded.[26] Why, then, did these countries finally agree to monitored caps, albeit weaker ones? Because without them, equity for even poorer developing countries and low-lying island nations would be stretched to the breaking point. China and India may not be wealthy, but in 2011, their contributions to this worldwide climate change problem, whose effects fall on the poorest countries, amounted to more than 26% of total emissions.[27] To not have them agree to something is clearly

19. *Id.*
20. *Id.*
21. Anita M. Halvorssen, *International Law and Sustainable Development Tools for Addressing Climate Change*, 39 DENV. J. INT'L L. & POL'Y 397, 414 (2011).
22. John Broder & James Kanter, *China and U.S. Hit Strident Impasse at Climate Talks*, N.Y. TIMES, Dec. 14, 2009, *available at* http://www.nytimes.com/2009/12/15/science/earth/15climate.html.
23. Richard Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1172 (2009).
24. *Id.*
25. *India Third Largest Greenhouse Gas Emitter*, HINDUSTAN TIMES (Aug. 3, 2011, 9:05 PM) http://www.hindustantimes.com/India-news/NewDelhi/India-third-largest-greenhouse-gas-emitter/Article1-729024.aspx [hereinafter *India*].
26. *China Records Biggest Reduction in Emissions*, SHANGHAI DAILY at A2 (Nov. 27, 2011), *available at* http://www.shanghaidaily.com/nsp/National/2011/11/27/China%2Brecords%2Bbiggest%2Breduction%2Bin%2Bemissions/.
27. *See India*, *supra* note 25.

inequitable at this time, though it would not have been inequitable from the perspective of 1993. Indeed, just in two short years, many developing countries moved away from the Chinese position as being the "best" for all developing countries.[28] Professor Bodansky did not have the results from the Durban COP to explicate in his book, but I do think the importance of equity or "rights based" goals in International Environmental Law have been more important historically than acknowledged in the book.

II. The Role of Individuals and Social Norms

Kudos to Professor Bodansky for emphasizing the role that individuals can and do play in the formulation of International Environmental Law. Chapter 6 focuses entirely on the "players" in the game, but he goes beyond this by noting throughout the book how important personal values and morality are to the motivations of these players. Professor Bodansky recognizes the importance that the process and personal interaction can have on swaying the minds of those that make decisions and moving groups of persons towards consensus.[29] This is a very important insight that has only seen extensive analysis in general since the 1990s.[30] Indeed, a whole school of thought in international law that focuses on the self-interest of states would deny that individual motivations or internal politics could play an important role in moving the debate.[31]

But Professor Bodansky notes many deviations from this state self-interest model: from "norm entrepreneurs" that try to push a particular idea or cause to the forefront, to representatives of smaller countries who follow their own personal values because they often have no formal instruction on how to proceed in international environmental negotiations.[32] Professor Bodansky also notes that by participating in the process over time, many of the personnel who actually do or facilitate the negotiations may "buy in" in a certain way that affects the movement of negotiations.[33]

This seems plausible as it echoes similar observations that have noted the role that socialization and individuals can play in the domestic debate over environmental issues.[34] Professor Michael Vandenbergh notes that individual norm creation can affect huge environmental problems.[35] It seems that such norm creation may be even more prevalent and possible in the close-knit community of international environmental negotiators and players. Given the vociferous debate over whether or not travelling to international conferences on

28. Juliet Eilperin, *At U.N. Climate Talks, Delegates Salvage Last-Minute Deal*, WASHINGTON POST (Dec. 10, 2011), *available at* http://www.washingtonpost.com/national/health-science/un-climate-talks-in-south-africa-teeter-on-edge-of-collapse/2011/12/10/gIQAwJXWlO_story.html.
29. *See* BODANSKY, *supra* note 1, at 148.
30. Victor B. Flatt, *Act Locally, Affect Globally, How Changing Social Norms to Influence the Private Sector Shows a Path to Using Local Government to Control Environmental Harms*, 35 B.C. ENVTL. AFF. L. REV. 455, 463 (2008).
31. *See* Jack Goldsmith & Eric Posner, *Response, The New International Law Scholarship*, 34 GA. J. INT'L & COMP. L. 463, 474-75 (2006).
32. BODANSKY, *supra* note 1, at 168, 193.
33. *See id.* at 120-22, 126, 186.
34. Flatt, *supra* note 31, at 469.
35. *See* Michael P. Vandenbergh, *Order Without Social Norms: How Personal Norm Activation Can Protect the Environment*, 99 NW. U. L. REV. 1101, 1104-05 (2005).

climate change was "worth it" in terms of carbon emissions, this is an observation that many environmental law professors have failed to acknowledge.[36]

This insight is also critical to how Professor Bodansky explains the ways that International Environmental Law can be formed. He discusses two models: "deep and narrow" or "broad and shallow."[37] The deep and narrow can work with a small number of countries that have similar interests and can eventually attract others who see how it works and how they can benefit.[38] For the initial small group of countries, such an approach ultimately reduces the need for ineffective compromise to attract more participants and also reduces uncertainty.[39] This has been the model for the European Union.[40] However, for worldwide problems that involve the global environment, the broad and shallow may be the only option. That is — an agreement that attracts many if not most of the potential adherents, but does so by binding them to very shallow commitments.[41] But because of the process of individual buy-in, shallow commitments can grow deeper over time. According to Professor Bodansky, "[F]ramework conventions…can create positive feedback loops that facilitate the deepening of the regime through the adoption of protocols containing specific substantive commitments."[42]

In fact, it is unusual for states to leave agreements even as they become more stringent, and Bodansky explains this with the buy-in theory.[43] Once a country has ratified a treaty, it begins implementation, which may also require changes in domestic law. Withdrawal can pull apart many interconnected strands. The attention focused on Canada's exit from the Kyoto Protocol suggests that it is the exception that supports Bodansky's theory.[44] Canadian Member of Parliament and Green Leader Elizabeth May stated:

> Not only has Canada just ended our commitments under an international treaty, I believe we are in violation of domestic law. The Kyoto Implementation Act was passed by the House of Commons in 2007 and has royal assent. It requires Canada to continue reporting and doing its job, fulfilling its obligations under the Kyoto Protocol. I wonder that the prime minister of this country thinks he can withdraw us from an international treaty which was ratified by the House of Commons with no discussion in the House, and violate a domestic law with no discussion in the House.[45]

Such rhetoric underscores again how important international law really is to creating change in the world, and Professor Bodansky's book is a marvelous explanation of how that can actually occur. Far from being "unreal," international environmental law is very real, has

36. In December of 2011, there were over 20 postings on the environmental law professors' listserv about the practice of sending environmental law faculty and students to attend the COP17 at Durban. Most were critical that "in person" presence served useful functions. (Dec. 2011) (on file with author).
37. BODANSKY, *supra* note 1, at 184-86.
38. *Id.* at 184.
39. *Id.*
40. *Id.*
41. *Id.* at 185.
42. *Id.* at 186.
43. *Id.* at 220.
44. Meagan Fitzpatrick, *May Accuses Harper of Breaking Law over Kyoto*, CBC NEWS (Dec. 13, 2011, 9:23 AM), *available at* http://www.cbc.ca/news/politics/story/2011/12/13/pol-may-kyoto.html.
45. *Id.*

had major impacts on our world, and will continue to do so over time. It may not be as predictable a science, but it is very real. Professor Bodansky does us a great service by explaining how and why in his very readable book, *The Art and Craft of International Law*.